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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 604

REGINALD P. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REYNOLDS ROBERTSON,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Summary Statement of Matter Involved.

Petitioner, convicted (June 26, 1936) and sentenced (June 29, 1936) in the District Court of the United States for the Southern District of New York for violation of the mail fraud and conspiracy statutes (R. 4, 5), filed prompt (June 30, 1936) and timely [1] notice of appeal to the Circuit Court of Appeals (R. 6).

In the statement of grounds of appeal accompanying the notice (R. 9) the point was made, among others, that as a matter of law there was no evidence sufficient to sustain the verdict or judgment. It became necessary, there-

[1] Criminal Appeals Rule III, 292 U. S. 662. ("Criminal Appeals Rules" are hereinafter cited as C. A. R.)

fore, that the narration and condensation[2] should embrace the whole of the evidence—4,000 pages of testimony and 500 exhibits (R. 29)—in order that the bill of exceptions might show affirmatively that it contained the purport and substance of all the evidence and thus avoid the presumption that omitted evidence sustained the verdict and judgment.[3] July 27, 1936, the trial judge (Patterson, J.), on application, extended the time to file and serve the bill of exceptions and assignment of errors until November 1, 1936 (R. 15).

Financially unable to engage his trial counsel to conduct the appeal, petitioner undertook the task himself[4]—with the assistance, commencing early in August, of two newly admitted members of the New Jersey bar (R. 20, 29). After these gentlemen had read the record in connection with the preparation of the assignment of errors, efforts were made to confer with Government counsel respecting the form and contents of the bill of exceptions; but these were unavailing until the middle of September, at which time such a conference was held (R. 20). Government counsel were of opinion that no condensation at all was practicable in view of the nature of the assignments of error; but they agreed to receive and consider a sample narration and condensation of a part of the testimony (R. 20-21). Petitioner thereafter submitted a sample narration and condensation of 600 pages of the testimony. Late in September, Government counsel advised that they were correcting and redictating the condensation submitted, but that the testimony of this petitioner would have to go in *verbatim* (R. 21).

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[2] C. A. R. IX, par. 2; Supreme Court Rule 8.

[3] *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 390, 391; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 488-490.

[4] Petitioner has been a member of the Bar since 1904, but has never been in active practice (R. 20, see R. 29).

By middle October petitioner had another 1,000 pages ready for submission—but Government counsel had not at that time, and have never at any subsequent time, returned with their corrections even the first batch of narrative and condensation submitted to them (R. 21).

[It may be noted at this point that the case had aroused wide public interest in New York; that it had been sharply contested through the eight weeks trial; that the evidence on vital points was admittedly circumstantial; that a Special Assistant to the Attorney General had been sent from another jurisdiction to try it in conjunction with the local U. S. Attorney's office; and that among the chief points upon appeal were petitioner's contentions (a) that this special prosecutor got his verdict by an indefensible appeal to passion and prejudice in his summation, and (b) that a woman attorney of the Department of Justice, assigned to assist in the prosecution of this case, had given an interview to a leading New York newspaper during the course of the trial charging this petitioner with attempting to influence a witness in this case; that the newspaper report of this interview came to the attention of the jury; that the special prosecutor and the Assistant U. S. Attorney knew of the interview, and yet no steps were taken to get the woman attorney's charge, and the issue as to the truth thereof, to the jury otherwise than in the newspaper columns.[5]]

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[5] By reason of a procedural error of the Circuit Court of Appeals, and, more especially, by reason of a consistent practice followed by the Clerk's Office of the District Court of the United States for the Southern District of New York in flat disregard of C. A. R. IX, par. 3 (more particularly discussed hereinafter) the bill of exceptions, assignments of error, indictment and other papers constituting the record have not even yet been sent to the Circuit Court of Appeals. Accordingly, the only "record" which petitioner can bring to this Court on this petition consists of the motions and affidavits filed by the parties in the Circuit Court of Appeals and the rulings of that court thereon. But petitioner has sworn to this petition (p. 35, *post*) and the truth of the statements made herein as to what is

Convinced that no agreement as to a condensed and narrative bill of exceptions could be reached with Government counsel within the remaining time, petitioner applied for a further extension of time for the settlement of the bill; and Judge Patterson, who as trial judge was familiar with all the circumstances and was best able to judge what the interest of justice required, allowed a further extension of two months on October 20, 1936 (R. 21, 17 and see R. 29-30). At the hearing on this application, Government counsel stated affirmatively that they did not oppose the relief sought, but would not formally consent since they deemed the trial judge to be without power under C. A. R. IX, par. 1,[6] to grant extensions except on order made within thirty days of the taking of the appeal.

Since this view as to the meaning of that provision of Rule IX is supported by the weight of authority [7] (although

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revealed by the record before the District Court, and as to the actual course of procedure herein, is not open to dispute. In like circumstances this Court has received affidavits *dehors* the certified "record." See *Taylor* v. *U. S.*, 286 U. S. 1, 4. In any event, sufficient appears in this case upon the face of the certified record to justify review and reversal.

[6] "In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice."

[7] *Yep* v. *U. S.*, 81 F. (2d) 637, 638 (C. C. A. 10); *Gallagher* v. *U. S.*, 82 F. (2d) 721, 722 (C. C. A. 8). In both of these cases, however, the Circuit Court of Appeals nevertheless considered the merits of assignments of errors based upon the evidence, and in the *Gallagher* case there was an additional circumstance that the further extension was granted, not only after the expiration of the original thirty day period, but after the expiration of the prior extension. *Cf. Welpa* v. *U. S.*, 84 F. (2d) 829, 831 (C. C. A. 8), and see dissenting opinion of Circuit Judge Woodrough at pp. 831-833.

there is a conflict of Circuit Court of Appeals decisions upon the point[7a]) petitioner did not deem it safe to rely wholly upon Judge Patterson's further extension order. Aware that the Circuit Court of Appeals for the Second Circuit had previously decided that Rule IX of the C. A. R. gives an individual judge of the Circuit Court of Appeals acting *ex parte* no power to grant additional extensions of time to settle bills of exceptions,[8] and that this Court had refused to review that ruling on certiorari,[9] petitioner applied for relief, not to an individual judge of the Circuit Court of Appeals, but to that court as a whole (R. 22). The theory was, that, under Rule IV of the C. A. R. entitled "*Control by Appellate Court,*" supervision and control of the appellate proceedings, "including the proceedings relating to the preparation of the record," had vested in the Circuit Court of Appeals as of the date of the filing of the duplicate notice of appeal in that court,[10] and that

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[7a] The Government's view has been adopted by the Eighth and Tenth Circuit Courts of Appeals (see footnote 7, *supra*) and by the Second Circuit Court of Appeals in the instant case. But the Third Circuit Court of Appeals in *Fierman* v. *United States*, 84 F. (2d) 968, holds that the rule permits the trial judge to grant an additional extension after the expiration of the thirty days provided it is granted within the period of the first extension, but that additional extensions are not authorized where granted after the expiration of the period of the prior extension.

[8] *U. S.* v. *Adamowicz*, 82 F. (2d) 288, at least when not assigned to sit in the District Court in the absence, disability or death of the trial judge, Rule XIII, C. A. R.

[9] 80 L. Ed. 747.

[10] Paragraphs 1 and 2 of Rule IV, C. A. R. provide:

"The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal."

Notices of appeal were filed by this petitioner in the trial court on June 30, 1936 (R. 6) in compliance with paragraph 3 of Rule III, C. A. R.,

under that rule the Circuit Court of Appeals had specific authority to "modify any order made by the trial judge or by any judge in relation to the prosecution of the appeal * * *"[11]

This is a new point, which has not, so far as counsel have been able to ascertain, been presented or decided in any previous case. It is submitted that petitioner's view as to the power of the Circuit Court of Appeals, acting as a court under Rule IV, is not only in accord with the express language of the rule, but is consistent with the dominant theory of the C. A. R. as a whole to eschew labored detail but to vest immediate control of the whole appeal, "including the proceedings relating to the preparation of the record on appeal," in the Circuit Court of Appeals so that that court may modify, either by shortening or enlarging, periods of time for the preparation of the record granted by the trial judge, or make such other procedural orders as are appropriate in the circumstances of the particular case, and such as may be conducive of the due administration of justice with all deliberate speed.

The application for relief under Rule IV was heard by the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ.), through the medium of a bi-party argument on Oc-

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but the trial court clerk did not file the duplicate notice with the clerk of the Circuit Court of Appeals until August 9, 1936. (See endorsements R. 10). While the control of the appeal vested in the appellate court as of the latter date and, therefore, existed at the time (October 20-27, 1936) of the application for relief to the appellate court referred to in the text above, the delay by the trial court clerk of forty days in filing the notice of appeal can scarcely be squared with the requirement of Rule IV that he shall file it "immediately"; and this is but one of a number of instances of practical disregard of the C. A. R. exhibited by this case.

[11] Paragraph 3 of Rule IV, C. A. R. provides:

"The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court, or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

tober 27, 1936 (R. 22), and the view as to the scope of the power of that court under Rule IV as above set forth was specifically pressed upon the court (R. 22).

While the Circuit Court of Appeals rendered no written opinion upon this application, the judges present at the hearing then indicated (a) that they doubted the power of the trial judge to grant a further extension; (b) that they did not regard Rule IV as giving the Circuit Court of Appeals the power suggested; but (c) they unanimously suggested, as a compromise measure, that in the circumstances of this case, and in order to avoid any jurisdictional question, an application should be made to the trial judge for an order settling the stenographer's verbatim transcript as the bill of exceptions, and that thereafter an application might be made to the Circuit Court of Appeals for time to prepare, agree upon and print a condensed and narrative record under Rule IX, par. 4, C. A. R. (R. 23). This rule provides that after the bill of exceptions has been settled and the record on appeal filed with the clerk of the Circuit Court of Appeals:

> "The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or *reduction* of the record filed with the appellate court, and may issue such directions to the trial court or trial judge, in relation thereto, as may be appropriate." [Emphasis added.]

As appears by the uncontradicted affidavit of this petitioner in the record now before this Court (R. 23), the following occurred in connection with the hearing of the application discussed immediately above:

> "Judge Hand, at this time stated in substance, 'I do not believe that you will oppose such an application, Mr. Brower.' Mr. Brower stated that he might oppose this application. Whereupon, Judge Hand said in substance, 'I think that upon reconsideration, you will

withdraw your opposition.' And Judge Manton said in substance, 'That is the direction of this court.' "

On the following day petitioner applied to Judge Patterson to settle the stenographer's minutes as the bill of exceptions; and this motion was opposed by Government counsel upon the ground that the trial judge was without power to do so since the requirements as to condensation and narration had not been complied with (R. 23). Judge Patterson at first granted the motion and signed an order settling the bill of exceptions in the form presented, but shortly thereafter struck his signature and denied the motion (R. 24). Petitioner immediately applied to the Senior Circuit Judge, who agreed to convene the Circuit Court of Appeals to hear an application for mandamus or other relief; but before this proceeding had been consummated, a conference was held with Judge Patterson and Government counsel in the chambers of the Senior Circuit Judge at which Judge Patterson suggested that petitioner strike the colloquy of counsel from the stenographer's minutes, thus accomplishing a condensation, and appear before him on the following Monday, November 2, for settlement of the bill (R. 24). This was done and the minutes again presented for settlement on Monday, November 2. Judge Patterson at first refused to settle the bill, on the Government's suggestion that it was presented out of time and that he was without power to do so; but, later on the same day, being convinced that Sundays are excluded from the count under the C. A. R., he signed an order settling the stenographer's minutes, as condensed, as constituting the bill of exceptions (R. 25).

As appears by the uncontradicted affidavit of this petitioner in the record before this Court, "Judge Patterson stated that error might have been committed and that he did not wish to deprive your petitioner of his appeal" (R. 25).

On the same day, November 2, 1936, the settled bill of exceptions and assignment of errors were filed with the clerk of the trial court (R. 25), in compliance with paragraph 1 of Rule IX, C. A. R. It thereupon became the mandatory duty of the clerk of the trial court to send the record, including the bill of exceptions and assignment of errors to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX, C. A. R., which reads as follows:

> "Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal."

The clerk of the trial court has never taken any steps whatever to comply with this rule, and, according to the best information that this petitioner can obtain, does not intend to do so (see affidavit of Silberman, *post*, pp. 37-39). The result is that the record has never been transmitted to the Circuit Court of Appeals. On November 4, desiring to withdraw the bill of exceptions from the office of the clerk of the Circuit Court of Appeals in order to finish the narrative thereof for the use of that court pursuant to the procedure previously suggested by the Circuit Court of Appeals, petitioner secured an order from the Senior Circuit Judge dated November 5, 1936, directed to the clerk of the Circuit Court of Appeals to permit petitioner to withdraw the bill of exceptions from the clerk's office for that purpose (see affidavit of Silberman, *post*, p. 37). It was then discovered that neither the bill of exceptions nor any other part of the record had been transmitted to the Circuit Court of Appeals by the District Court clerk. Whereupon, petitioner and his assistants appeared in the office of the clerk of the trial court and demanded that the bill of ex-

ceptions and the rest of the record be sent to the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX. The clerk of the trial court said that he had never heard of any such practice, and that such procedure is never followed in his office, but that the appellant was required to make deposit for printing with the trial court clerk and have the record printed by him before it was sent to the Circuit Court of Appeals; and that this old practice which formerly obtained was still followed by his office, the C. A. R. to the contrary notwithstanding (affidavit of Silberman, *post*, pp. 37-39).

Such a procedure, besides being in flat disregard of the express mandate of paragraph 3 of Rule IX, frustrates the whole purpose of the C. A. R. in providing for the vesting of immediate control of the appellate proceedings in the appellate court and the prompt transmittal of the record to that court before printing. Petitioner conceives that it was one of the objects of the C. A. R. that the appellate court might hear the appeal without printing, or might, after the record reached it, provide for expeditious hearing in such manner and upon such conditions as it might determine to be appropriate to the particular case. This whole plan is frustrated by the practice being followed by the District Court clerk.

Moreover, it is productive of precisely the sort of delay in the hearing of appeals as the new rules were intended to prevent, in that appellants, like this petitioner, who will have substantial difficulty in financing the printing of these enormous criminal records, are deprived of any opportunity to get the record before the appellate court unless and until they have raised the requisite sums demanded by the clerk of the trial court. There is no statutory or other warrant in law for the practice observed by the clerk

of the trial court in this respect, and it is in the public interest that this procedure be disapproved by this court.[12]

Meanwhile, and on November 16, 1936, Government counsel secured from the clerk of the trial court certified copy of the docket entries in the case and certificate that appeal had been allowed (R. 1-6; 12), and moved the Circuit Court of Appeals to docket and dismiss the appeal under Rule XIV of the Circuit Court of Appeals [13] upon the ground that petitioner had failed to docket the case in the Circuit Court of Appeals in time, and because the bill of exceptions was not settled in compliance with Rule IX, C. A. R. (R. 11). The affidavit of Government counsel in support of the motion to docket and dismiss raised both the contention that the bill of exceptions was ineffective because not in condensed and narrative form, and that it had been allowed and settled out of time (R. 14). By opposing affidavit your petitioner called attention of the Circuit Court of Appeals to the facts of which it was already aware, and which have been detailed above, including the fact that the

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[12] The matters stated in this and the two preceding paragraphs are not of record but appear by the affidavit of Richard E. Silberman annexed to and made a part of this petition for certiorari. For precedent for affidavits *de novo* in this court upon such points, see *Taylor* v. *U. S.*, 286 U. S. 1, and note 5, *ante*. While the trial court clerk has never yet taken any steps to comply with paragraph 3 of Rule IX and has not sent the record or any part of it to the Circuit Court of Appeals, your petitioner, after great difficulty, was able to persuade an assistant clerk of the trial court, upon the authority of the Senior Circuit Judge's order above referred to, to release the bill of exceptions to the petitioner so that he might continue his efforts to narrate and condense it for the use of the Circuit Court of Appeals in accordance with the suggestion made by that court as above adverted to. See affidavit of Silberman, pp. 37-39 *post*.

[13] Reading (so far as is pertinent) as follows:

"In criminal cases it shall be the duty of the appellant to docket the case and file the record within the time fixed by Rules VIII and IX of the Rules of the Supreme Court in criminal cases. If the appellant shall fail to comply with this rule, the appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed."

procedure which the petitioner had followed with respect to the bill of exceptions was that suggested by the Circuit Court of Appeals itself (R. 16-18).

On December 4, 1936, the Circuit Court of Appeals (Manton, L. Hand, and Swan, JJ.) entered an order dismissing the appeal "for lack of jurisdiction" (R. 18). No opinion was delivered in connection with this order.

On December 9, and well within the time allowed by the Circuit Court of Appeals Rules (Rule XXVI, C. C. A.), petitioner filed an application for a rehearing (R. 19-27), duly sworn to by himself (R. 28) and by Messrs. Silberman & Stern (R. 27-28), who are the two members of the New Jersey bar who had been assisting him, and who were aware of the facts and proceedings as stated herein. This petition recited these facts and proceedings at length; renewed the arguments for the construction of the C. A. R. previously advanced; specifically requested the Circuit Court of Appeals to exercise its discretionary power under the C. A. R. to accord petitioner relief; asserted that failure so to do would constitute an abuse of discretion; and prayed that, at the least, the Circuit Court of Appeals should indicate the ground of its decision in order that review in this Court might be had (R. 27).

The facts stated in this petition for rehearing with respect to the proceedings (as hereinbefore detailed) were not controverted by the Government nor questioned by the Circuit Court of Appeals in its subsequent opinion or otherwise.

The Circuit Court of Appeals held the application for about two weeks, and on December 22 announced its *per curiam* opinion (R. 29-31) and its order (R. 32). The opinion recites the case was pending on "motions for reargument of motions to correct the record; also to dismiss the appeal" (R. 29), and it concludes, "The motion to amend the record is denied and the motion to dismiss the appeal

is granted." The order recites the denial of a motion "for a reargument of the motions to correct the record and dismiss the appeal" (R. 32). As a matter of fact, there was never any motion to amend or correct the record. There was never any question as to the accuracy of the record, nor any attempt to correct it. What your petitioner had urged in opposition to the motion to docket and dismiss and in support of the petition for rehearing was that the Circuit Court of Appeals, among other courses, has authority under paragraph 4 of Rule IX, C. A. R., to direct a "*reduction* of the record" to condensed and narrative form in order to comply with the requirements, and that it can do that either by remitting the record to the trial court, or by letting the record, including the bill of exceptions as settled, stand as and when filed in the Circuit Court of Appeals, but having the work of completing the narrative condensed version of that bill done by counsel in the Circuit Court of Appeals, and the case argued on the basis of that condensed narration.

The opinion of the Circuit Court of Appeals upon the petition for rehearing did, however, accede to the request of petitioner for a statement of the grounds of decision. The opinion makes the following rulings:

(1) that the trial judge had no power to grant an additional extension of time after the thirty-day period had elapsed (R. 30);

(2) that the Circuit Court of Appeals had no power to grant such an extension (R. 30)—even on a motion under Rule IV, C. A. R., par. 5, to modify an extension order granted by the trial judge within the thirty-day period.

(3) that in view of the exclusion of Sundays and holidays in computing the time under the C. A. R. (Rule XIII, C. A. R.), the settlement of the bill of exceptions on Mon-

day, November 2, was timely and was within the period of the initial extension (R. 30);

(4) but that the appeal must be dismissed because the assignment of errors included a contention of lack of evidence to support the indictment, and this required an examination of all the evidence, and that since the bill of exceptions was not in condensed and narrative form, it was insufficient (R. 31). In making this ruling, the Circuit Court of Appeals took no exception to the accuracy, inclusiveness or timeliness of the settlement of the bill of exceptions, but placed its ruling squarely and solely on the ground that it was not in narrative and condensed form. It may be noted, in addition, that due to the disregard of rules by the trial court clerk the assignment of errors were not before the Circuit Court of Appeals and that court had no means of knowing, and apparently did not inquire, whether there were any assignments going to errors on the record proper which would require consideration even in the absence of a bill of exceptions. While petitioner does not suggest that such was the fact, yet the point is mentioned here to indicate the dangers which inhere in the disregard of orderly procedure;

(5) that the Circuit Court of Appeals could not remit the record to the District Court to permit the narration and condensation to be accomplished, because the time for the settlement of the bill of exceptions had expired; and that in this aspect the time limitation provisions of Rule IX, C. A. R. must be regarded as making the rule of *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, inapplicable in criminal cases (R. 31);

(6) that the provisions of Rule IX, C. A. R. authorizing the Circuit Court of Appeals to entertain a motion by either party for the correction, amplification or reduction of the record filed with the appellate court or to issue directions

to the trial court in relation thereto do not authorize the Circuit Court of Appeals to do so with reference to the bill of exceptions. The theory of the Circuit Court of Appeals was that that would amount to a correction or change in the bill of exceptions, that the trial court was without power to do so since the time had expired, and that the Circuit Court of Appeals was without power to do so because it was not its own record and it was, therefore, incompetent to "correct or change it" (R. 31). It will be noted that the Circuit Court of Appeals passes over in silence the fact that at the hearing of the previous motion for relief before the settlement of the bill of exceptions, the same Circuit Court of Appeals judges had unanimously suggested to this petitioner that the verbatim transcript be settled as the bill of exceptions, and that the narration and condensation could thereafter be done in the Circuit Court of Appeals under Rule IX (see R. 22-23). Indeed, the undisputed affidavit of this petitioner in the record before this Court discloses that the court did not limit itself to suggestion, but in effect *directed* the procedure which was ultimately followed (R. 23). It may also be noted that the Circuit Court of Appeals in its final opinion does not adopt the view apparently entertained by a majority of the judges at the argument of the motion to docket and dismiss, i. e., that a bill of exceptions otherwise unobjectionable, but not in narrated and condensed form, is a nullity, and that, therefore, there was no evidence whatever before the Circuit Court of Appeals upon which it could take any action at all. Such a view is obviously indefensible under the authorities.[14] In the reasons relied upon for the allowance of the writ in this petition (*post*, pp. 16, *et seq.*), petitioner will show that the

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[14] *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U. S. 305, 308;
Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 387;
Alexander v. *Cosden Pipe Line Co.*, 290 U. S. 484, 490, 491.

substituted grounds of decision ultimately relied upon by the Circuit Court of Appeals are equally indefensible;

(7) after placing its decision squarely upon grounds of lack of jurisdiction and power, the Circuit Court of Appeals added briefly at the end of its opinion: "The appellant had four months and has offered insufficient excuses for his delinquency" (R. 31).

Reasons Relied Upon for the Allowance of the Writ.

This case discloses a lamentable succession of material errors by the court below, as well as by the clerk of the United States District Court. It is patent that the C. A. R. are not undersood in the Second Circuit; that the very court (the Circuit Court of Appeals) to which the theory of those rules intends to give a broad discretionary authority, fails to appreciate the plan upon which the rules are drawn; that this lack of understanding has contributed to the erroneous and restrictive construction by it of particular provisions of those rules intended to grant it broad power; and that the trial court clerk in that Circuit (at least in the Southern District of New York) is consistently following a procedure flatly in the face of a specific provision of those rules and one calculated to destroy one of the primary advantages which the rules sought to make effective.

It is of obvious public importance that misconstruction and misunderstanding of the C. A. R. by the courts primarily charged with their enforcement be promptly corrected (points 2 and 3, *post*), especially upon points as to which there is conflict of view (point 2, *post*) and that consistent disregard of the plain mandate of these rules by the clerks of the District Courts be ended (point 1, *post*).

In addition, the result is tragically unjust to the petitioner—depriving him of an appeal allowed him by the statute which he has bent every effort to perfect, and which

presents substantial questions as to the lawfulness of his conviction (point 5, *post*).

Finally, if the ruling of the Circuit Court of Appeals can in any just sense be regarded as a mere discretionary refusal to accord relief within its power to grant, then this is a patent case of an abuse of such discretion (point 4, *post*).

These points, relied upon as grounds for the granting of the writ, are briefly developed below:

1. *The result of the failure of the District Court clerk to send up the record in compliance with the rule and the error of the Circuit Court of Appeals in considering the application to docket and dismiss in the absence of the record.*

While the errors referred to under this heading may not be of primary importance to the determination of this particular case (if the Circuit Court of Appeals is right in its ultimate determination that the bill of exceptions is fatally defective and that there is no authority to remedy the situation), the petitioner cannot afford by silence to be put in the position of acquiescing in erroneous procedure. Accordingly, the point is now specifically made that the trial court clerk, despite the mandate of C. A. R. IX, par. 3, failed and refused to certify the record including the bill of exceptions and assignment of errors to the Circuit Court of Appeals and still fails and refuses to do so; that the Circuit Court of Appeals, being vested with full control of the situation by C. A. R. IV and IX, should have corrected this disregard of law; and that it was prejudicial and reversible error for the Circuit Court of Appeals, in the circumstances, to consider and determine the appeal upon a motion to docket and dismiss without requiring the clerk of the trial court to obey the law and send up the record.

While a reversal of the decision below in this case upon these narrow procedural grounds alone would not be adequate in the circumstances, the consequence of continued adherence to improper practice in the Second Circuit may be most serious, and it is respectfully suggested that this opportunity should be taken to disapprove the disregard of orderly and plainly prescribed procedure which is exhibited in this case.

If the clerks of Federal District Courts in criminal cases, following a practice antedating the promulgation of the C. A. R. and doubtless proper enough in civil cases, can continue to refuse to send up records in criminal cases as soon as the bill of exceptions is settled and filed with the assignment of errors, and can continue to require that the convicted defendant shall first raise the money and cause the record to be printed before the record can get to the appellate court, the very delays that it was the purpose of the C. A. R. to avert will be intensified. The obvious purpose of the rules in putting the question of prompt hearing of the appeal, whether on a printed or an unprinted record, in the control of the appellate court, will be defeated.

It was also improper for the Circuit Court of Appeals to entertain and determine the appeal upon a motion to docket and dismiss in the absence of the record, and in the face of the disregard of the rule by the trial court clerk. Under the rule of the Circuit Court of Appeals (Rule XIV) as under the rule of this Court (Supreme Court Rule 11, par. 1), a motion to docket and dismiss lies only where the appellant is in default of docketing the case within the time allowed. In all cases not covered by the C. A. R. the case must be docketed in the appellate court before the return day, and that return day is the date named in the citation. But in criminal cases the citation has been abolished (C. A. R. III, par. 2); there is no return day; and Rule VIII, C. A. R., in cases appealed on the record proper, and

Rule IX, C. A. R. in cases appealed on bills of exceptions, take away from the appellant the duty of getting the record from the trial court to the appellant court and place it solely on the clerk of the trial court. This is not understood and is not being obeyed. How is it possible under these Criminal Appeals Rules for the appellant to be in default in respect of an act which it is no longer his duty to perform?

It may be suggested that while the motion of the Government counsel to the Circuit Court of Appeals was in the technical form of a motion to docket and dismiss, it was competent for the Circuit Court of Appeals to regard it as a motion filed under par. 3 of Rule IV, C. A. R. to dismiss the appeal because of jurisdictional defects.[15]

Assuming *arguendo* that it is competent for the Circuit Court of Appeals to entertain such a motion before the record has been sent to it or even before the record has been prepared, yet it is clearly an abuse of discretion for that court to entertain such a motion in the absence of such a vital paper as the assignment of errors. The "record" which was before the Circuit Court of Appeals contained no copy of the assignment of errors, and, for all that the Circuit Court of Appeals knows from its records, this case may involve important questions arising on the face of the record proper and having nothing to do with the bill of exceptions.[16] And yet the whole appeal has been dismissed for supposed fatal defect in the bill of exceptions.

In brief, then, as to this part of the case, the Circuit Court of Appeals erred (a) in disregarding the breach of

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[15] "The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

[16] The first of the preliminary "grounds of appeal" (C. A. R. III, par. 3) goes to error on the record proper (R. 9).

rules by the trial court clerk; (b) in entertaining a motion to docket and dismiss for default of appellant when the matter as to which default was claimed is the duty of the trial court clerk and not of the appellant, under the Criminal Appeals Rules; and finally (c), if the Government's motion to docket and dismiss be regarded as a motion to dismiss the appeal for jurisdiction defects pursuant to authority conferred upon the Circuit Court of Appeals by par. 3 of C. A. R. IV, then it was error for the Circuit Court of Appeals to entertain and determine the motion without adequately informing itself of the record and the issues.

These matters, while not dispositive of the case, evidence departures from orderly procedure which should not be overlooked.

2. *The ruling as to the lack of the power of the trial judge or of the Circuit Court of Appeals to grant additional time for the settlement of the bill of exceptions or to modify the original order of extension.*

The Circuit Court of Appeals here ruled that the trial judge has no power to grant a further extension of time for the settling and filing of the bill of exceptions except upon an order entered within thirty days after the taking of the appeal (R. 30). This is supported by decisions in the Eighth and Tenth Circuits which constitute the weight of authority.[17] This view, however, is directly in conflict with that of the Circuit Court of Appeals for the Third Circuit announced in *Fierman* v. *United States,* 84 F. (2d) 968, where it was ruled that a further extension of time for filing the record and assignment of errors was not within the authority of the trial judge when made after the expiration of a prior order of extension, but where it was also ex-

[17] *Yep.* v. *U. S.*, 81 F. (2d) 687, 689 (C. C. A. 10); *Gallagher* v. *U. S.*, 82 F. (2d) 721, 722 (C. C. A. 8). *Cf. Wolpa* v. *U. S.*, 84 F. (2d) 829, 831 (C. C. A. 8).

pressly ruled that further extensions are authorized by C. A. R. IX when, as in the present case, granted within the period of a prior timely extension.

This conflict of view upon this important question should be settled by this Court.

With respect to the power of the Circuit Court of Appeals to modify the trial judge's timely order of extension by extending the length of the extension, this case presents a novel question not heretofore raised in any case so far as petitioner has been able to ascertain, and it is urged that the ruling of the Circuit Court of Appeals upon this point is plainly at war with the express terms of C. A. R. IV and with the plan of the Rules as a whole. As previously pointed out, that rule vests supervision and control of the appeal in the Circuit Court of Appeals from the date of the filing with its clerk of the duplicate notice of appeal which, in this case, occurred on August 9, 1936. That supervision and control extends to and includes "the proceedings relating to the preparation of the record on appeal" (C. A. R. IV, par. 2); and that supervision and control is expressly defined to include the power to "modify any order made by the trial court or by any judge in relation to the prosecution of the appeal." Petitioner is unable to see how this intentionally broad language can be squared with the view that it does not lodge power anywhere to modify an order of the trial judge with relation to settling and filing a bill of exceptions. It is precisely the bill of exceptions situation which is likely to be productive of the most difficulty, and in respect of which it is most essential that there be a discretionary power somewhere to take consideration of the circumstances of particular cases. If it is to be supposed that busy trial judges may be disposed to be lenient or may be too busy to inquire into the situation, it may be proper to refuse them power to grant more than the one extension, but this Court does not have to be re-

minded that it is beyond the power of any defendant by any act of his alone to procure the settlement of the bill of exceptions within any stated time. He can only do so with the concurrence of the trial judge, and, as a practical matter, it is essential for him also to secure the concurrence and the active cooperation of opposing Government counsel who may, whether or not properly, have a hostile attitude. The difficulties in securing this cooperation and concurrence are intensified in bitterly fought cases such as the present one, and where the evidence upon material and vital issues is wholly circumstantial, thus adding to the difficulty of any agreement as to narration or condensation.

This case does not involve the mere question whether under all the circumstances of this case the Circuit Court of Appeals should in its discretion have exercised its power of modification under par. 3 of C. A. R. IV. In this case, the Circuit Court of Appeals has denied its power. It has used terms broad enough to deny the possession of any power to modify an order as to the time for settling a bill of exceptions, whether the modification sought be on application of the Government seeking to reduce the time fixed by the trial judge, or on application by the defendant seeking to increase it. What the Circuit Court of Appeals has done is to carve the bill of exceptions settlement situation out of the rule, or, stated another way, to read into Rule IV, par. 3, an exception denying its power when the modification sought is one relating to the time for the settlement of the bill. We are unable to see any justification for that view. There is no recorded authority in support of it. *United States* v. *Adamowicz*, 82 F. (2d) 288, cert. den. 80 L. Ed. 747, cited by the Circuit Court of Appeals, is not in point because the further extensions in that case were not sought by an application to the Circuit Court of Appeals to modify the trial court's order, but by *ex parte* applica-

tion in chambers to an individual judge of the Circuit Court of Appeals to grant additional extensions.

The opinion of the Circuit Court of Appeals upon this point gives no reason for its ruling (R. 30). It is supported neither by authority nor by the text of the rule which the Circuit Court of Appeals was purporting to construe. The matter is one of general importance and first impression, and deserves the consideration of this Court.[18]

3. *The major error of the Circuit Court of Appeals in ruling that the appeal must be dismissed because the bill of exceptions was not in narrated and condensed form, and in ruling that it lacked any power to permit or direct a procedure to cure the difficulty.*

The Circuit Court of Appeals has flatly ruled in this case that where a bill of exceptions contains all the evidence set out verbatim; and where the only attempt at condensation consists of striking out colloquy of counsel; and where the bill is signed and settled within time by the trial judge pursuant to what amounted to a direction by the appellate

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[18] If it is objected that petitioner should have sought review in this Court on this point on October 27 when the Circuit Court of Appeals initially though informally ruled that Rule IV was not broad enough to permit it to make the modification suggested, and when the Circuit Court of Appeals suggested, and in fact directed, the alternative procedure that was in fact followed (R. 23), the answer is that this petitioner was not required to seek review in this Court until he had exhausted all means of relief in the Circuit Court of Appeals and secured a final adjudication from that court. It is well settled in this Court that a failure to seek review of an interlocutory ruling of the Circuit Court of Appeals is not laches (*Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 91), and that on certiorari to review a final decision of a Circuit Court of Appeals this Court may notice and rectify errors that may have occurred in interlocutory proceedings in the Circuit Court of Appeals (*Hamilton Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258, 259; *Toledo Scale* v. *Computing Scale Co.*, 261 U. S. 399, 418; *Panama Railway Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 284). Moreover, the Circuit Court of Appeals noticed and decided this point in its opinion upon its final decision (R. 30).

court; and when there is no question as to the accuracy or sufficiency of the bill,—nevertheless, there is a failure to comply with the rules as to condensation and narration, which is jurisdictional and requires the dismissal of the appeal; and that the Circuit Court of Appeals has no jurisdiction or power to do anything to alleviate the situation.

This is certainly unjust in this particular case. It is also clearly out of line with the views as to the effect of the narration and condensation rule which prevailed in the opinions of this Court prior to the C. A. R. It is a novel and startling ruling on a matter of general importance and deserves review.

As previously indicated (*ante*, p. 15), the majority of the Circuit Court of Appeals was at first disposed to the view that when a bill of exceptions, although in all other respects complying with the rules, was not narrated and condensed, it was a nullity and there was nothing anybody could do about it. This is plainly untenable. The settled rule which obtained both at law [19] and in equity [20] prior to the promulgation of the C. A. R., was that the penalty for failure to observe the requirements as to narration and condensation of evidence in the bill of exceptions or statement of evidence lay in the discretion of the appellate court, and should be made to fit the circumstances of the particular case. It was settled that for such failure the appellate court might dismiss the appeal; [21] might decline to consider assignment of errors based upon the evidence; [22] might consider and decide the questions arising on the record proper only; [23] or might remit the transcript to the trial court for compliance

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[19] *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 490.

[20] See cases in four following notes.

[21] *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 173, 174.

[22] *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318, 325.

[23] *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U. S. 305, 308.

with the rule,[24] and assess damages and costs against the offending party.[24a] And this Court had also ruled that there might be cases in which the appellee would be estopped to complain of failure to observe the rule respecting condensation and narrative.[25]

By the instant opinion, the Circuit Court of Appeals has announced a new doctrine, to the effect that the C. A. R. have changed the penalty from one resting in the discretion of the court, to an absolute bar to an appeal. Specifically, it has now been ruled by the court below that the power exercised in the *Barber Asphalt* and *Fairbanks, Morse* cases by this Court no longer exists in respect of criminal cases. It is said that the record cannot be remitted by the appellate court to the trial court for narration and condensation of the bill of exceptions for the reason that C. A. R. IX now imposes a time limit for the settlement of the bill, which cannot be enlarged.

The fault in this reasoning lies in the assumption that prior to the C. A. R. there was no time limit for the settlement of the bill of exceptions. But there was a very definite time limit,—the settled rule being that the power of the trial judge to allow and settle a bill of exceptions ended with the end of the term of court at which the judgment was rendered, except as that term had been extended for that purpose by standing rule, by special order, or by consent of the parties.[26] It is true that such definite limits are not observed in equity cases (*Barber Asphalt Paving Co.* v.

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[24] *Fairbanks, Morse & Co.* v. *American Valve & Meter Co.*, 276 U. S. 305, 308; *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 387.

[24a] *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, *id.*

[25] *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 490, 491.

[26] *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 298; *Muller* v. *Ehlers*, 91 U. S. 249, 250; *Reporters* v. *Butterworth-Judson Co.*, 258 U. S. 365, 368, 369; *Jennings* v. *Railway Co.*, 218 U. S. 255, 257, 258.

Standard Asphalt & Rubber Co., 275 U. S. 372, 385); but it can scarcely be asserted that this affords rational ground (in the absence of statutory command) why failure of compliance with identical narration requirements is to be regarded as fatal at law but excusable in equity. In the *Barber Asphalt* and *Fairbanks, Morse* cases, this Court directed the remitting of the transcript to the trial court for compliance with the rule as to condensation and narration long after the ending of the term. There is no valid reason why this is not also good procedure at law, whether in civil or criminal cases. The force of Rule IX, C. A. R. is expended by changing the initial time limit from the end of the term to a specific period of thirty days after the taking of the appeal, with provision for extension by the judge. There is nothing in the language of that rule, or in the C. A. R. as a whole, which justifies the assumption that this Court intended, in respect of criminal cases, to abrogate the doctrine of *Fairbanks, Morse* and *Barber Asphalt*, and to tie the hands of the appellate court whatever the exigencies of the situation might be.

The exigencies of this particular case were such as to call for the exercise of remedial power by the appellate court. The trial judge, familiar with the circumstances, in effect so ruled in allowing the additional extension of time which the Circuit Court of Appeals held to be futile. The Circuit Court of Appeals had itself initially recognized that the situation called for an enlightened and flexible use of the new C. A. R. when it found, suggested, and in effect directed, the procedure which it initially thought would avoid the net of procedural difficulties which have robbed this petitioner of his appeal. And the Circuit Court of Appeals, in its final opinion on rehearing—notwithstanding its closing remark as to the time which petitioner had had—felt bound to place its decision upon the ground of lack of jurisdiction and want of power.

We do not believe that the C. A. R. were intended to rob the appellate court of power in appropriate cases to remit the transcript to the trial court for the purpose of narration and condensation of the evidence, although the time for the settling of the bill had expired. On the contrary, we believe that the new rules provide an additional and a more speedy and flexible procedure even than that, if the Circuit Court of Appeals deems the particular case to justify its use. Under par. 4 of Rule IX, C. A. R., the Circuit Court of Appeals is expressly given power to order a "reduction of the record filed with the appellate court." It may or may not accomplish that by directions to the trial court. The rule is clearly broad enough to authorize the Circuit Court of Appeals, where a bill of exceptions has been filed containing all the evidence verbatim and as to the accuracy of which there is no question, to direct the parties within such time as that court deems proper to file a condensation and narrative of it for use at the hearing of the appeal. We cannot understand how such an order can be regarded, as the Circuit Court of Appeals regarded it, as amounting to a "correction" or "change" (R. 31) of the bill of exceptions. To supply a narrative form version of an existing and settled bill of exceptions is but to comply with a rule of form and procedure which, after all, is primarily for the benefit of the appellate court itself.

Of course, the C. A. R. are not to be construed as permitting the narration and condensation of evidence to be disregarded as a matter of practice in all cases, with the idea that this can always be attended to later on in the Circuit Court of Appeals. No such result followed the decisions in the *Barber Asphalt* and *Fairbanks, Morse* cases; nor is it to be apprehended from a proper construction of the Criminal Appeals Rules.

Flexibility, with control in the appellate court, is the keynote in the new rules. The rigid rule advocated by the

Circuit Court of Appeals in this case will serve to defeat its own purpose. If the bar and Federal trial judges are told that once a date for settling a bill of exceptions has been set by the trial judge it is irrevocable, the tendency is going to be for counsel to insist upon, and for trial judges (who know the difficulty which always attends the narration and settlement of the bill of exceptions) to grant, disproportionately long extensions of time in the first place. This will contribute to delay in a greater percentage of cases than would be the fact if the appellate court has the discretionary power to fit the time to the exigencies of the particular case, as they in fact develop.

A further result of the rigid rule advocated by the Circuit Court of Appeals would be that if the trial judges do start granting inordinately long periods initially for the settlement of bills, the Circuit Court of Appeals will be powerless to do anything about it, because the Circuit Court of Appeals has ruled in this case that its power to modify orders of the trial court with relation to appeals does not extend to orders concerning bills of exceptions (see point 2, *ante*).

These considerations, we submit, establish that the question under this heading is no minor technicality but is a matter of major concern. The ruling below on this point is without any reported authority to support it; is not supported by, but, we submit, is in conflict with, the express language as well as the general purport of the C. A. R.; and, in addition to the novelty and importance of the question, this decision is the first one holding that a rule of procedure sanctioned by this Court in at least three previous cases has been overruled *sub silencio* and by inference by language of the C. A. R. which we submit was never intended to have any such effect.

4. The ruling of the Circuit Court of Appeals dismissing the appeal for want of narration and condensation of the bill of exceptions constitutes an abuse of discretion.

For reasons already stated, petitioner does not believe that the opinion below can be regarded as basing the order of dismissal upon a ruling that he had shown no grounds for relief in respect of the bill of exceptions, the question of power aside. At the best, the opinion below must be regarded as based both upon the ruling of lack of power and upon the ruling as to discretion, and we submit, without further argument, that if the Circuit Court of Appeals had deemed itself possessed of the power to correct the situation and hear the appeal on the merits, this Court cannot say from the record before it that it would have refused relief upon discretionary grounds.

But if the decision below were to be regarded as a discretionary refusal to accord relief within the power of the appellate court to grant, then it must be reversed because constituting a patent abuse of discretion. In *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 386, 387, the appellant had totally failed to observe the requirements respecting condensation and narration, and the Circuit Court of Appeals, which had previously consistently overlooked such failures, took notice of it in that case and dismissed the appeal. This Court held that it was within the power of the Circuit Court of Appeals to remit the transcript to the trial court so that full compliance might be had with the rule respecting condensation and narration. It further held that the Circuit Court of Appeals had abused its discretion in dismissing the appeal rather than in remitting the transcript. The abuse was said to lie in the fact that the harsh penalty of dismissal was invoked "notwithstanding the transgression was largely due to its [the Circuit Courts of Appeals'] own

course of action" in being lax in enforcement of the rule in prior cases.

This is not the *Barber Asphalt* case. We do not place our argument upon the ground that in other criminal cases the Circuit Court of Appeals has been lax in enforcing the rules as to condensation and narrative,—although we are informed that such is the fact. This case is worse than the *Barber Asphalt* case from the standpoint of abuse of discretion. Here was no mere laxity in previous cases which lulled counsel into a sense of security. Here the appellate court, when a motion for relief was made to it under Rule IV, C. A. R., affirmatively took a hand in the situation, ruled that the relief asked for was not proper, suggested that it had the very power which it now denies that it has, and directed that the precise procedure followed by this petitioner should be followed. If the Circuit Court of Appeals does have the power which it thought it had at the hearing on October 27, and which this petitioner maintains that the rules intended it to have, then we can conceive of no greater abuse of discretion than in refusing, in the circumstances of this case, to exercise it.

At the time this suggestion and direction were made by the appellate court, the petitioner had already reduced to narrative form a substantial portion of the evidence and he still had six days left before the settlement date. While it is true that the Government had not at that time agreed to any of the narrative, it cannot be assumed that if the Circuit Court of Appeals had not suggested this alternative procedure and had merely denied the relief under Rule IV that the petitioner could not have completed the narration of the remaining evidence within the time and procured the trial judge to settle it even if the Government would not agree. Moreover, as appears by the affidavit of Mr. Silberman (*post*, p. 39) it was stated to the Cir-

cuit Court of Appeals on behalf of the petitioner at the argument on October 27, that this petitioner, so far as he was concerned, could complete his narration and condensation for settlement within the time still remaining. If that procedure had been followed and the bill settled without the Government's concurrence, then the Government, if so advised, could have come into the Circuit Court of Appeals afterwards and moved on five days' notice under par. 4 of Rule IX, C. A. R. to correct or change the record. The Circuit Court of Appeals, however, suggested and "directed" that petitioner should present the stenographer's minutes for settlement as the bill of exceptions, and thereafter get together with the Government for a condensation. This procedure was put forward by the Circuit Court of Appeals "in order to avoid any jurisdictional question" (R. 23). By the suggestions and directions of the appellate court, therefore, the appellant was lulled into a situation which was far more the result of the action of the appellate court itself than in the *Barber Asphalt* case, and which had far more than the "implied sanction" of the appellate court referred to in that case.

5. *The appeal from the judgment of conviction is upon substantial and meritorious grounds.*

Petitioner is aware that if the writ of certiorari be granted this Court's review would very properly be limited to the procedural and jurisdictional matters already discussed herein. Indeed, neither the indictment, the assignment of errors, nor the bill of exceptions is before this Court, so that any discussion of the merits of the appeal with a view to their review at this time would be improper. But in order to preclude any suggestion that the appeal itself is a frivolous one taken merely for delay, petitioner deems it proper to state a few basic and indisputable facts respecting the major (although not all) of his assignment of errors,

even though he must go outside the record before this Court in order to do so.

(a) Petitioner believes that there was no evidence as a matter of law sufficient to sustain the verdict or judgment. He was Vice-President of the Westchester Title & Trust Company during the depression years 1931 and 1932, and was in charge of advertising for the Company. The indictment was for using the mails to defraud and for conspiracy so to do. The alleged fraud consisted of selling mortgage participation certificates issued by the Company to the public through the mails in 1931, and 1932 and 1933 on false representations as to their safety as an investment. Indicted and tried with petitioner were the Company itself, Stevens, its President; Kuss, its Vice-President in charge of sales; and Condit, Chairman of the Executive Committee of its Board of Directors.

The issues as to scienter and good faith were sharply fought; and the prosecutor admitted in his summation that the evidence was largely circumstantial. The jury disagreed as to Condit, resulting in a mistrial as to him; but convicted all the other defendants (R. 4, 13). Kuss received a suspended sentence with probation for the duration thereof; Stevens, one year and a day imprisonment; your petitioner, two years' imprisonment (R. 13).

In these circumstances it is impossible for any court, without examining the evidence, to dismiss as frivolous petitioner's assignment that there is no evidence sufficient in law to establish his guilty participation in a fraudulent scheme. He is given by statute a right to have a Circuit Court of Appeals pass upon that point. That it is not frivolous is further attested by the statement made by the trial judge when he signed the bill of exceptions, i. e., that error might have been committed, and that he did not want to

be responsible for depriving this petitioner of his appeal (R. 25).

(b) The closeness of the case and the sharp difference as to the sufficiency of the evidence throws into a strong light the second major assignment of error, which relates to the refusal of the court to withdraw a juror and declare a mistrial. The undisputed facts are that during the course of the trial one C. Agnes McHugh, a special attorney of the Department of Justice assigned to assist in the prosecution of this case, gave out in an interview to Scripps-Howard newspapers a statement that this petitioner had handed a note to a character witness directing him how to testify upon a major question going to the merits of the case. This interview was flatly contradictory of petitioner's evidence as to the contents of the note, which showed that it did not have the character of any instructions to the witness, but, on the contrary, asked him a question. The interview on its face constitutes a flat charge by a member of the prosecuting staff that the petitioner during the course of the trial was tampering with a witness. It is admitted of record, by stipulation, that both the United States attorney in charge of the prosecution, and the Special Assistant to the Attorney General who was also conducting it, were at the time aware of the fact of this interview. On presentation of the motion to withdraw a juror, Judge Patterson suspended the trial for half a day, and then denied the motion, with a general caution to the jury to disregard newspaper articles. In making this ruling, Judge Patterson put it of record that he was "quite sure" and that "I certainly assumed" that the McHugh interview (which appeared in a leading New York newspaper) had been read by some, if not by all, of the jurors.

Under the circumstances, the petitioner will strongly urge on his appeal that the indefensible conduct of the prosecution in making such a grave charge against this petitioner in the newspapers only, was fatal reversible error, and was not cured by merely cautioning the jury.

The reversible character of this error is especially manifest when the wholly circumstantial character of the evidence on the questions of knowledge and good faith is considered.

(c) Another prejudicial trial occurrence most seriously objected to is the summation to the jury by Special Assistant to the Attorney General Brower for the United States. Petitioner will press upon the Circuit Court of Appeals the contention that this summation was a bald appeal to passion and prejudice, in which it was insinuated that the defendants were of a privileged class upon whose behalf political influence had been exerted; in which the unfortunate circumstances of some of the alleged "victims" were harped upon; in which an article by Warden Lawes of Sing Sing Prison was quoted at length in the development of the argument that crime will never be cured until "frauds and deceptions" perpetrated by "pillars of society" by means of "acts which are criminal in nature, but legal in result," are punished with the same severity visited upon acts of those who are avowed members of the underworld; and which also referred to the pernicious activities in the accumulation of wealth by individuals who go unpunished "merely because they have influence to offset their acts."

In addition, Mr. Brower characterized the defendants as "rats", and their actions as comparable to those which resulted in the Morro Castle disaster. Although petitioner's status as an attorney was not in issue, and although it appears of record that the petitioner has not practiced his

profession since 1904, the fact that he is an attorney was made the occasion to press upon the jury the obvious fact that this gave him no license to violate the law.

The summation was also prejudicial in other respects, more particularly referred to in the assignments of error. It went outside the issues; it injected improper considerations; and, to secure a conviction, it frankly appealed to passions and prejudices, all too easily aroused in these days of depression whenever an investment dealer is on trial and workers and widows are prosecution witnesses.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the order and judgment of the said United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

REYNOLDS ROBERTSON,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Reginald P. Ray, of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the petitioner in the foregoing petition named; I have read the same and am familiar with the matters stated therein. The facts, matters and things therein contained, so far as they relate to my acts, are true, and so far as they relate to acts of others, I believe them to be true.

My said petition is filed in good faith for what I verily believe to be just and legal cause, and it is not intended for the purpose of delay.

REGINALD P. RAY.

Subscribed and sworn to before me this 28th day of December, 1936.

[SEAL.] ALFRED C. SWETT,
Notary Public, New York County.

N. Y. Co. Clerk's No. 763, Reg. No. 7-S-1021.
My commission expires March 30, 1937.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No.

REGINALD P. RAY, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

Affidavit of Richard E. Silberman.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Richard E. Silberman, of full age, being duly sworn upon his oath, deposes and says:

I am a member of the New Jersey Bar and have been actively engaged in the conduct of the appeal to the United States Circuit Court of Appeals in the above-entitled cause.

On November 2, 1936, Judge Patterson signed an order settling the stenographer's minutes of the trial as the bill of exceptions herein. The said bill of exceptions was immediately filed with the Clerk of the United States District Court for the Southern District of New York.

Pursuant to the proposed procedure suggested by the Circuit Court of Appeals for the Second Circuit, which was to withdraw the stenographer's minutes from the files and proceed to reduce the bill of exceptions to condensed and narrative form, an order was obtained from the Senior Circuit Judge on the 5th day of November, 1936, authorizing the defendant to withdraw the said stenographer's minutes and directing the clerk of the said Circuit Court of Appeals to allow said withdrawal. A copy of said order is hereto annexed and made part hereof. This order was duly filed with the Clerk of the said Circuit Court of Appeals.

On the following day your deponent, together with the defendant Mr. Ray appeared before the Clerk of the Circuit Court of Appeals and requested the stenographer's minutes. We were informed by said clerk that he did not have the minutes in his file and that the practice followed in his office was that the original record was retained by the clerk of the District Court and that nothing was forwarded to him until the record was printed. We informed the clerk that under paragraph 3 of Rule IX of the Supreme Court in Criminal Cases, it was the duty of the clerk of the District Court forthwith to transmit all of the records filed in his court, together with his certificate as soon as the bill of exceptions was settled and filed.

The clerk thereupon informed us that he was not aware of any such practice and that it was definitely not the practice in his office.

We thereupon took the original order of the Circuit Judge allowing the withdrawal of the bill of exceptions and appeared before the clerk of the United States District Court for the Southern District of New York and requested him to give us the stenographer's minutes. He refused to do this without an order of a District Court Judge and we then told him that according to the rules the stenographer's minutes should not be in his possession but should have been forwarded to the Circuit Court of Appeals. He told us that he had never heard of such a practice and that this was never done in his office.

We read to him the third paragraph of Rule IX and he then said he had never heard of this procedure but suggested that we speak to a Miss Mahoney, one of the assistant clerks in his office who would be familiar with appellate procedure.

We thereupon appeared before Miss Mahoney and told her what had transpired. She informed us that she knew of the new rules in Criminal Cases but that they had been

completely disregarded in this Circuit and that the old procedure was still followed. She then took a certified copy of the order of the Circuit Court and entered it in the docket in the District Court and then accompanied us to the clerk in the filing room and finally after much difficulty persuaded him to release the stenographer's minutes which are now in our possession.

Your deponent has inquired at the office of the clerk of the District Court and at the office of the clerk of the Circuit Court of Appeals, and is informed that, up to the date of the making of this affidavit, no record in this cause has been transmitted to the clerk of the Circuit Court of Appeals pursuant to paragraph 3 of Rule IX of the Criminal Appeals Rules.

Your deponent further states that on October 20, 1936, when an application was made to the trial judge for a further extension of time within which to settle and file the bill of exceptions herein and it was indicated that he had no power to grant a further extension, the trial judge stated that he had always given additional extensions of time in similar circumstances and that he was willing to do so now.

Your deponent further states that on October 27, 1936, when the Circuit Court of Appeals suggested the procedure finally adopted, it was stated to that court, in response to its question, that so far as the petitioner was concerned a narration and condensation for settlement could be completed within the time still remaining.

RICHARD E. SILBERMAN.

Sworn to and subscribed before me this 28th day of December, 1936.

[SEAL.]

ALFRED C. SWETT,
Notary Public, New York County.

N. Y. Co. Clerk's No. 763, Reg. No. 7-S-1021.
My commission expires March 30, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

No. C-96881.

THE UNITED STATES OF AMERICA, *Plaintiff*,

against

J. CRAWFORD STEVENS, FREDERICK P. CONDIT, REGINALD P. RAY, PHILIP H. KUSS and THE WESTCHESTER TITLE & TRUST COMPANY, *Defendants*.

Order.

Good cause appearing, it is on this — day of November, 1936,

Ordered, that the clerk of this Court be and he hereby is authorized and directed to deliver to the defendant, Reginald P. Ray, the bill of exceptions heretofore filed in this appeal consisting of five volumes of the typewritten stenographic minutes of the trial, one volume containing the summation of Walter Brower, Special Assistant to the United States Attorney General, and one volume containing the charge of the court and other proceedings after the trial consisting of 3,981 pages in all; and it is further

Ordered, that the defendant Reginald P. Ray be and he hereby is authorized to withdraw the aforesaid bill of exceptions and retain same until the further order of this Court.

MANTON,
U. S. C. J.

Endorsed: Filed Nov. 5, 1936.